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**COMMISSIONERS**  
GARY PIERCE - Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

**ORIGINAL**



**ARIZONA CORPORATION COMMISSION**

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AZ CORP COMMISSION  
DOCKET CONTROL

DATE: MARCH 13, 2012  
DOCKET NO.: WS-02987A-08-0049

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Order on:

**SWING FIRST GOLF, LLC v. JOHNSON UTILITIES, LLC  
(COMPLAINT)**

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

MARCH 22, 2012

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

MARCH 27, 2012 AND MARCH 28, 2012

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission

**DOCKETED**

MAR 13 2012

DOCKETED BY

ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 GARY PIERCE - Chairman  
4 BOB STUMP  
5 SANDRA D. KENNEDY  
6 PAUL NEWMAN  
7 BRENDA BURNS

8 SWING FIRST GOLF, LLC,  
9 Complainant,

10 V.

11 JOHNSON UTILITIES, LLC,  
12 Respondent.

DOCKET NO. WS-02987A-08-0049

DECISION NO. \_\_\_\_\_

**ORDER**

13 Open Meeting  
14 March 27 and 28, 2012  
15 Phoenix, Arizona

16 **BY THE COMMISSION:**

17 This Order comes before the Arizona Corporation Commission (“Commission”) to resolve a  
18 disputed Motion to Withdraw a Complaint with prejudice.

19 \* \* \* \* \*

20 Having considered the entire record herein and being fully advised in the premises, the  
21 Commission finds, concludes, and orders that:

**FINDINGS OF FACT**

**Procedural History**

22 1. On January 25, 2008, Swing First Golf, LLC (“Swing First”) filed with the  
23 Commission a Formal Complaint against Johnson Utilities, LLC dba Johnson Utilities Company  
24 (“Johnson” or “Utility”).

25 2. On February 5, 2008, Swing First filed an Amended Complaint alleging that Johnson  
26 has violated a Utilities Service Agreement (“USA”) executed between Swing First’s predecessor<sup>1</sup> and

27 <sup>1</sup> Swing First’s predecessor was Johnson Ranch Holdings, LLC (“Holdings”), an affiliate of Sunbelt Holdings  
28 Management, Inc. Holdings acquired a master planned community known as Johnson Ranch through Sunbelt. (Swing  
First Amended Complaint at 1)

1 Johnson; that Johnson has overcharged Swing First for water deliveries of both effluent and Central  
 2 Arizona Project ("CAP") water; that Johnson has overcharged Swing First for monthly minimums;  
 3 that Johnson owes Swing First for a billing credit related to a Management Services Agreement  
 4 ("MSA"); that Johnson has illegally charged Swing First for the Water Quality Assurance Revolving  
 5 Fund ("WQARF") Tax (hereinafter "Superfund Tax"); that Johnson has overcharged for the  
 6 transaction and privilege tax; that Johnson has failed to properly read Swing First's meters; and that  
 7 Swing First has experienced numerous service interruptions.<sup>2</sup> Swing First's Amended Complaint  
 8 requests relief in the form of continued service by Johnson during the pendency of the Complaint  
 9 proceeding; a determination of the amounts owed to Swing First for overcharges occurring from the  
 10 period of November 2004 to present; that Johnson be ordered to stop charging for the Superfund Tax;  
 11 that Johnson render proper bills to Swing First based on meter reads; that Johnson correct monthly  
 12 minimum overcharges as well as the amount paid for the Transaction Privilege Tax; and that the  
 13 Commission order Mr. George Johnson to personally apologize to Swing First and its members for  
 14 poor customer service and abusive and obscene language.

15 3. On February 13, 2008, Johnson filed its Answer and Counterclaim to Complainant's  
 16 Amended Formal Complaint. Johnson's Answer generally denies the allegations set forth in the  
 17 Complaint and seeks amounts on a counterclaim which Johnson alleges are delinquent and owed by  
 18 Swing First for water services deliveries.

19 4. On February 20, 2008, Swing First filed a Conditional Motion to Consolidate Dockets.  
 20 Swing First's Motion requested that the Complaint docket be consolidated with a pending docket in  
 21 which Johnson requested authority to transfer all of its assets to the Town of Florence, Arizona and  
 22 for cancellation of Johnson's water and wastewater Certificates of Convenience and Necessity  
 23 ("CC&Ns") in Pinal County.<sup>3</sup>

24 5. On the same date, Swing First filed a Motion for Procedural Conference, requesting  
 25 that a procedural schedule be set on the Complaint proceeding.

26 6. On February 21, 2008, Johnson filed a Motion for Procedural Order, requesting that a  
 27

28 <sup>2</sup> Generally, Amended Complaint.

<sup>3</sup> See, Docket No. WS-02987A-07-0203. This docket was administratively closed by Decision No. 70220 (April 1, 2008).

1 procedural schedule be established for a hearing on the Complaint.

2 7. On February 22, 2008, by Procedural Order, a procedural conference was set for  
3 March 14, 2008, and the Utilities Division ("Staff") was directed to appear for the conference.

4 8. On February 22, 2008, Johnson filed a Response to Swing First's Motion for  
5 Procedural Order, objecting to Swing First's request, among other things, to setting a discovery  
6 timetable. Johnson's response stated that the Amended Complaint only involves a billing dispute and  
7 that setting an elaborate procedural schedule was unnecessary.

8 9. On the same date, Johnson filed a response to Swing First's Motion to Consolidate,  
9 stating that Johnson objected to the request to consolidate Johnson's transfer docket and the  
10 Complaint docket.

11 10. On March 12, 2008, Johnson docketed documents related to a Maricopa County  
12 Superior Court case filed by Johnson against Swing First.<sup>4</sup>

13 11. On March 14, 2008, a procedural conference was held as scheduled. Johnson, Swing  
14 First and Staff appeared through counsel. Discussions were held regarding discovery. It was also  
15 determined that Swing First's motion to consolidate was moot because Johnson had subsequently  
16 withdrawn its application to transfer its assets to the Town of Florence and to cancel its CC&N.

17 12. On March 19, 2008, by Procedural Order, the guidelines for the initial phase of  
18 discovery were established and the parties were directed to discuss settlement of the issues.

19 13. On May 5, 2008, Swing First filed a Motion to Compel discovery responses.

20 14. On May 13, 2008, Johnson filed a Motion to Compel discovery responses.

21 15. On May 16, 2008, a telephonic procedural conference was held with the parties and  
22 Staff and procedural timeframes were discussed.

23 16. On May 20, 2008, by Procedural Order, oral argument on the motions to compel was  
24 scheduled for June 18, 2008.

25 17. On May 30, 2008, Johnson filed a Reply to Swing First's Motion to Compel, objecting  
26 to Swing First's request for documents and responses.

27  
28 <sup>4</sup> Maricopa County Superior Court Case *Johnson Utilities, LLC et. al. v. Swing First Golf, LLC et. al* (Cause No. CV2008-000141 ("Superior Court Case")).

1           18.    On the same date, Swing First filed a Response to Johnson's Motion to Compel,  
2 objecting to Johnson's request for documents and responses.

3           19.    On June 18, 2008, a procedural conference was held as scheduled. Staff, Swing First,  
4 and Johnson appeared through counsel. Oral argument was heard on both Johnson's and Swing  
5 First's motions to compel. The motions were ruled on from the bench, and additional discovery  
6 deadlines were set, as well as a date for settlement discussions.

7           20.    On August 7, 2008, Swing First filed a Notice of Change of Address.

8           21.    On December 4, 2008, Johnson filed a Motion for Summary Judgment ("MSJ") and  
9 Statement of Facts in Support of its MSJ.

10          22.    On December 11, 2008, Swing First filed a Motion for an Extension of Time to File a  
11 Response to the MSJ. The Motion stated Johnson did not oppose Swing First's request.

12          23.    On December 15, 2008, by Procedural Order, Swing First's request for an extension of  
13 time was granted. On the same date, Swing First filed its response to Johnson's MSJ, requesting  
14 denial of the MSJ and requesting that a ruling on the MSJ be stayed until discovery had been  
15 completed and the Commission had ruled on Johnson's rate application.

16          24.    On December 17, 2008, Johnson filed a Notice of Substitution of Counsel. Johnson  
17 also filed, on the same date, a Request for an Extension of Time to Reply to the Response to MSJ,  
18 until December 23, 2008.

19          25.    On December 23, 2008, Johnson filed a Reply to Swing First's Response to the MSJ.

20          26.    On December 30, 2008, Swing First filed a Notice of Filing Affidavit of David Ashton.

21          27.    On January 8, 2009, Johnson filed a Motion to Stay Discovery Pending Ruling on MSJ.

22          28.    On January 13, 2009, Swing First filed its Response to Johnson's Motion to Stay  
23 Discovery.

24          29.    On January 14, 2009, Johnson filed a Reply to Swing First's Response to Motion to  
25 Stay Discovery Pending Ruling on MSJ.

26          30.    On January 15, 2009, by Procedural Order, oral argument was scheduled to be heard  
27 on Johnson's MSJ on February 2, 2009. The Procedural Order also denied Johnson's motion to stay  
28 discovery pending a ruling on the MSJ.

1           31.    On February 2, 2009, a procedural conference was held as scheduled to hear oral  
2 argument on Johnson's MSJ. Johnson, Swing First and Staff appeared through counsel. At the  
3 conclusion of the conference, the matter was taken under advisement.

4           32.    On February 6, 2009, Swing First filed a Second Motion to Compel.

5           33.    On February 13, 2009, Johnson filed a Response to Swing First's Motion to Compel  
6 and Cross Motion to Compel Discovery Responses.

7           34.    On February 18, 2009, Johnson filed two Notices of Deposition.

8           35.    On February 20, 2009, Swing First filed a Notice of Inappropriate Discovery and  
9 Litigation Tactics. On the same date, Swing First filed a Reply to Johnson's Response to Swing  
10 First's Motion to Compel and a Response to Johnson's Cross Motion to Compel Discovery  
11 Responses.

12          36.    On February 26, 2009, Swing First filed a Motion to Quash Depositions.

13          37.    On February 27, 2009, Johnson filed a Notice of Subpoena.

14          38.    On March 5, 2009, Johnson filed a Response to Swing First Motion to Quash  
15 Depositions and Cross Motion to Compel Deposition Testimony of David Ashton.

16          39.    On March 12, 2009, a telephonic procedural conference was held to discuss the  
17 pending motions filed by the parties. Johnson, Swing First, and Staff appeared through counsel.  
18 Pending discovery issues were discussed and resolved. Further, the parties were directed to make a  
19 joint filing updating the Commission on their discovery progress by April 12, 2009.

20          40.    No other filings were made in this docket until December 30, 2009. On that date,  
21 Swing First filed a Notice of Filing Direct Testimony and a Motion for a Procedural Conference.

22          41.    On February 1, 2010, by Procedural Order, a procedural conference was scheduled to  
23 be held on February 17, 2010, to discuss the status of discovery and the procedural posture for the  
24 proceeding.

25          42.    On February 17, 2010, a procedural conference was held as scheduled. Johnson,  
26 Swing First, and Staff appeared through counsel. Swing First stated that the parties had been actively  
27 involved in the ongoing litigation in Johnson's rate case. Johnson and Staff stated that they believed  
28 some of the issues raised in the Amended Complaint may be resolved in Johnson's rate case and that

1 the final briefs had been filed in the rate case proceeding. Discussions were also held regarding  
2 Johnson's MSJ and Swing First's request for attorney's fees. Further, Staff was directed to file a  
3 response to Johnson's MSJ and to address the legal issues raised in both the MSJ and Swing First's  
4 request for attorney's fees. Discussions were held regarding Staff's limited resources due to its  
5 participation in Johnson's rate case and other pending matters. At the conclusion of the procedural  
6 conference, the issues were taken under advisement.

7 43. On March 29, 2010, by Procedural Order, Staff was directed to file a response to the  
8 MSJ, specifically addressing the jurisdictional issues raised in the MSJ; Johnson and Staff were  
9 directed to respond to Swing First's request for attorney's fees; Johnson and Swing First were  
10 directed to file replies to Staff's response to the MSJ; and Swing First, Johnson, and Staff were  
11 directed to make a joint filing outlining any areas where there was agreement between the parties.

12 44. On May 14, 2010, Staff filed a response to the MSJ recommending denial of the MSJ  
13 and requesting that the Complaint proceeding be stayed pending the final order of the Commission in  
14 Johnson's rate proceeding.

15 45. On the same date, Johnson filed a Response to Swing First's Request for Attorneys' Fees.

16 46. On June 15, 2010, Swing First filed a reply to Johnson's response to Swing First's  
17 request for attorneys' fees and a reply to Staff's response to the MSJ.

18 47. On the same date, Johnson filed a reply to Staff's response to the MSJ.

19 48. On July 6, 2010, Swing First filed a Report Concerning Agreement on Issues, stating  
20 that the parties were not in agreement on any issues.

21 49. On August 25, 2010, the Commission issued Decision No. 71854, regarding Johnson's  
22 rate application.<sup>5</sup>

23 50. On August 31, 2011, by Procedural Order, Johnson's MSJ was denied and a  
24 procedural conference was scheduled for September 22, 2011, to determine a procedural schedule in  
25 this matter.

26  
27 <sup>5</sup> Subsequent Decisions issued in the Rate Docket are as follows: Decision No. 71910 (September 28, 2010), Order *Nunc*  
28 *Pro Tunc*; Decision No. 72089 (January 20, 2011), Order ruling on CAGR D Adjustor; Decision No. 72533 (August 17,  
2011), Order ruling on Compliance with Best Management Practices Tariffs; Decision No. 72579 (September 15, 2011),  
Order Amending Decision No. 71854; and Decision No. 72634 (October 14, 2011) Order Approving New CAGR D Fees.

1           51.     On September 7, 2011, Swing First filed a Notice of Filing Superior Court Trial  
2 Scheduling Order. The Notice stated that the trial between Swing First and Johnson in the Superior  
3 Court Case was scheduled to begin on March 13, 2012.

4           52.     On September 20, 2011, Swing First filed a Motion for Continuance requesting that the  
5 Complaint proceeding be continued until after such time as a verdict was rendered in the Superior Court  
6 case because many of the issues raised in the Complaint and the Superior Court case are the same.

7           53.     On September 21, 2011, Johnson filed an Opposition to Swing First Golf's Motion for  
8 Continuance and Proposed Procedural Schedule and Notice of Change of Address of Legal Counsel.  
9 Johnson's filing opposed any further delay in the Complaint proceeding; urged Swing First to  
10 withdraw its Complaint against Johnson; and stated that if Swing First will not withdraw its  
11 Complaint, the Commission should set a hearing date and establish a procedural schedule for this  
12 matter.

13           54.     On September 22, 2011, a procedural conference was held as scheduled. Staff,  
14 Johnson, and Swing First appeared through counsel. During the procedural conference, Swing First  
15 reiterated its request for a second continuance in the Complaint proceeding and Johnson continued to  
16 oppose any delay in this matter. The parties and Staff discussed a proposed procedural schedule for the  
17 Complaint proceeding and, at the conclusion of the procedural conference, the discussions were taken  
18 under advisement. Further, the parties were directed to continue settlement discussion of the issues.

19           55.     On September 27, 2011, Swing First filed a Withdrawal of Complaint ("Withdrawal").  
20 The Withdrawal states that it is based on Johnson's agreement that "there is no reason to waste the  
21 Commission's resources on a moot case" and that Johnson "will not disconnect utility service to  
22 Swing First for non-payment of the disputed portions of its bills" during the pendency of the Superior  
23 Court case. The Withdrawal also states that Swing First withdraws any pending motions and requests  
24 that this docket be closed.

25           56.     On October 4, 2011, Johnson filed a response opposing Swing First's withdrawal of  
26 the Amended Complaint.

27           57.     On October 7, 2011, Swing First filed a Reply to Johnson Utilities' Response.

28           58.     On October 11, 2011, Staff filed its Response to Swing First's request to withdraw its

1 Complaint stating that Staff has no objection to Swing First's request to withdraw its Amended  
2 Complaint.

3 59. On November 30, 2011, Johnson filed a request for oral argument on Swing First's  
4 request to withdraw its Amended Complaint.

5 60. On December 5, 2011, Swing First filed objections to Johnson's request for oral  
6 argument on Swing First's request to withdraw its Amended Complaint.

7 61. On December 8, 2011, a telephonic procedural conference was held with the parties  
8 and Staff to discuss Johnson's request for oral argument. Swing First, Johnson, and Staff appeared  
9 through counsel. At the conclusion of the procedural conference, Johnson's request for oral  
10 argument was granted.

11 62. On December 12, 2011, by Procedural Order, oral argument on Johnson's objection  
12 to Swing First's request to withdraw its Amended Complaint with prejudice was scheduled for  
13 January 17, 2012.

14 **Superior Court Filings**

15 63. On January 17, 2012, a procedural conference was held to hear oral argument on  
16 Swing First's Request to Withdraw its Amended Complaint with Prejudice and Johnson's objections  
17 thereto. Swing First, Johnson, and Staff appeared through counsel. At the conclusion of the  
18 procedural conference, Johnson and Swing First were directed to file documents related to the  
19 Superior Court Case and the matter was taken under advisement.

20

21 64. On January 19, 2012, Johnson filed a Notice of Filing Johnson Utilities, LLC's  
22 Motion for Summary Judgment in the Maricopa County Superior Court Case.

23 65. On the same date, Swing First filed its Response to Johnson's Motion for Summary  
24 Judgment in the Maricopa County Superior Court Case.

25 66. On January 31, 2012, Johnson filed its Reply to Swing First's Response to Johnson's  
26 Motion for Summary Judgment filed in the Maricopa County Superior Court Case.

27 67. On February 17, 2012, by Amended Procedural Order, Swing First and Johnson were  
28 directed to file all pleadings, rulings, minute entries, and orders, filed or issued in the Superior Court

1 case as of January 27, 2012; the parties were notified they were under a continuing obligation to file  
 2 all Superior Court case documents in this docket; and they were directed file an updated list of issues  
 3 they believed should be addressed by the Commission and which should be addressed in Superior  
 4 Court.

5 68. On February 24, 2012, Swing First docketed a Notice of Filing, which contained the  
 6 Superior Court filings; an updated list of issues; motion requesting reply filing; and motion  
 7 requesting a procedural conference. On the same date, Johnson docketed Notice of Filing, which  
 8 included an updated list of claims.

9 69. On February 28, 2012, Johnson docketed a Notice of Filing Pleadings, Rulings,  
 10 Minute Entries, and Orders filed in the Superior Court Case.

### 11 **Request for Withdrawal of Complaint**

#### 12 **Johnson's Position**

13 70. Johnson argues that Swing First does not have an absolute right to a voluntary  
 14 withdrawal of its Amended Complaint with prejudice and that the Commission should reject Swing  
 15 First's Withdrawal.<sup>6</sup> Johnson contends that allowing Swing First to withdraw its Amended  
 16 Complaint would be both a conflict with law and would substantially affect Johnson's interest.<sup>7</sup>

17 71. Johnson states that the voluntary withdrawal of the Amended Complaint by Swing  
 18 First is in conflict with the law. Johnson relies on Arizona Rules of Civil Procedure ("A.R.C.P.")  
 19 Rule 41 in support of its position that Swing First may not voluntarily withdraw its Amended  
 20 Complaint.<sup>8</sup>

21 72. A.R.C.P. Rule 41(a)(1) governs the voluntary dismissal of an action by a plaintiff  
 22 without prejudice and states:

23 Subject to the provisions of Rule 23(c), or Rule 66(c), or of any statute, an  
 24 action may be dismissed (A) by a plaintiff without order of court by filing a  
 notice of dismissal at any time before service by the adverse party of an answer

25 <sup>6</sup> Johnson Response in Opposition to Swing First Withdrawal of Complaint at 1.

26 <sup>7</sup> Generally, Johnson Request for Oral Argument and Supplemental Response in Opposition to Swing First Withdrawal of  
 Complaint.

27 <sup>8</sup> The Commission's procedural rules do not address the voluntary dismissals of complaints; however, A.A.C. R14-3-  
 101(A) states that if there is no Commission rule set forth, the A.R.C.P. shall govern. Further, A.A.C. R14-3-101(B)  
 28 states that the procedural rules are to be construed liberally and "[i]f good cause appears, the Commission or the presiding  
 officer may waive application of these rules when not in conflict with the law and does not affect the substantial interests  
 of the parties."

1 or of a motion for summary judgment, whichever first occurs, or (B) by order of  
 2 the court pursuant to a stipulation of dismissal signed by all parties who have  
 3 appeared in the action. Such an order may be signed by a judge, a duly  
 4 authorized court commissioner, the clerk of court or a deputy clerk. Unless  
 otherwise stated in the notice or order of dismissal, the dismissal is without  
 prejudice, except that a notice of dismissal operates as an adjudication upon the  
 merits when filed by a plaintiff who has once dismissed in any court of the  
 United States or of any state an action based on or including the same claim.

5 73. A.R.C.P. Rule 41(a)(2) further states that:

6 Except as provided in paragraph 1 of this subdivision of this Rule, an action  
 7 shall not be dismissed at the plaintiff's instance save upon order of the court  
 8 and upon such terms and conditions as the court deems proper. If a  
 9 counterclaim has been pleaded by a defendant prior to the service upon the  
 10 defendant of the plaintiff's motion to dismiss, the action shall not be  
 dismissed against the defendant's objection unless the counterclaim can  
 remain pending for independent adjudication by the court. Unless otherwise  
 specified in the order, a dismissal under this paragraph is without prejudice.

11 74. Johnson argues that pursuant to A.R.C.P. Rule 41(a)(1), Swing First may not  
 12 voluntarily dismiss its Amended Complaint without an order from the Commission and Johnson's  
 13 stipulation to the dismissal.<sup>9</sup> Johnson contends that under A.R.C.P. Rule 41(a)(1), Swing First's  
 14 Withdrawal is too late because Swing First filed its Withdrawal after service by Johnson of its  
 15 Answer, which included counterclaims, and its MSJ.<sup>10</sup> Johnson asserts that since it has not stipulated  
 16 to the dismissal of the Amended Complaint, Swing First's Withdrawal must be rejected.<sup>11</sup>

17 75. Johnson argues that even if A.R.C.P. 41(a) allowed for the withdrawal or dismissal of  
 18 Swing First's Amended Complaint at this late stage in the litigation, the Commission should deny  
 19 Swing First's Withdrawal because the Commission, not Superior Court, has jurisdiction over Swing  
 20 First's Amended Complaint as well as Johnson's counterclaims.<sup>12</sup> Johnson states it will be  
 21 prejudiced if Swing First is allowed to withdraw its Amended Complaint.<sup>13</sup>

22 76. Johnson asserts that the Commission's jurisdiction is exclusive and plenary to address  
 23 the issues raised in the Amended Complaint and Johnson's counterclaims.

24 77. Johnson contends that although Staff cites the bright line rule established in *Damron v.*  
 25

26 \_\_\_\_\_  
 27 <sup>9</sup> Johnson Response in Opposition to Swing First Withdrawal of Complaint at 3.

<sup>10</sup> Id.

<sup>11</sup> Id. at 3.

<sup>12</sup> Johnson's Response to Swing First Withdrawal at 4.

<sup>13</sup> Id.

1 *Sledge*,<sup>14</sup> (holding that the court has no discretion to deny a Plaintiff's Motion to Dismiss with  
2 prejudice) the instant case is distinguishable from *Damron* because Swing First intends to continue to  
3 litigate its claims against Johnson in the Superior Court Case, and therefore Swing First's dismissal  
4 of the Amended Complaint with prejudice would not be a complete adjudication of the issues as  
5 articulated in *Damron*. Johnson also argues that allowing Swing First to withdraw its complaint  
6 would leave Johnson in a "prejudicial no man's land" because Johnson has committed to the  
7 Commission that it will not disconnect water service to Swing First during the pendency of the  
8 Superior Court Case and yet Swing First's case before the Commission would be dismissed.<sup>15</sup>  
9 Therefore, Johnson contends a dismissal would not be a complete adjudication of the issues because  
10 Johnson's counterclaim requesting that the Commission authorize Johnson to disconnect service to  
11 Swing First for nonpayment of outstanding bills would remain unresolved.<sup>16</sup>

12 78. Johnson argues that other courts have chosen not to follow the rule articulated in  
13 *Damron* and chosen to consider the effect a dismissal with prejudice will have on a defendant.<sup>17</sup>  
14 Johnson argues that the Commission should follow the latter approach and consider the effect Swing  
15 First's Withdrawal will have on Johnson.<sup>18</sup>

16 79. Johnson asserts it will be adversely impacted if Swing First is allowed to withdraw its  
17 Amended Complaint and if Swing First is allowed to pursue its claims in Superior Court.<sup>19</sup> Johnson  
18 points to 1) the specialized expertise found at the Commission to address Swing First's claims in the  
19 Amended Complaint; 2) the likelihood of a ruling in Superior Court which is inconsistent with the  
20 obligations imposed on Johnson under its approved tariffs or as a public service corporation; 3)  
21 withdrawal of the Amended Complaint would leave Johnson without a complete and final resolution  
22 of the issues raised and would result in the waste of time and resources by Johnson; and 4)  
23 withdrawal of the Amended Complaint would leave Johnson without a final resolution as to  
24 Johnson's ability to discontinue service to Swing First for alleged unpaid amounts.<sup>20</sup>

25 <sup>14</sup> Johnson's Request for Oral Argument and Supplemental Response in Opposition to Swing First's Withdrawal at 3,  
26 referencing *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969).

<sup>15</sup> Tr. at 6.

<sup>16</sup> Id.

27 <sup>17</sup> Johnson's Request for Oral Argument and Supplemental Response in Opposition to Swing First Withdrawal at 3.

<sup>18</sup> Id.

<sup>19</sup> Id. at 4.

28 <sup>20</sup> Id. at 4-7.

1           80.     Johnson cites *Samsung Electronics Co., Ltd v. Rambus, Inc.*<sup>21</sup> in support of its position  
2 that the Commission should consider the effect on Johnson before dismissing Swing First's Amended  
3 Complaint with prejudice. In *Samsung*, the Court stated that:

4                     Some Courts have held that district courts lack the discretion to deny a Rule  
5 41(a)(2) dismissal when the plaintiff seeks dismissal with prejudice. See  
6 *Smoot v. Fox*, 340 F.2d 301, 303(6<sup>th</sup> Cir. 1964); *Shepard v. Egan*, 767 F.Supp.  
7 1158, 1165 (D.Mass.1990). However, the better approach is that adopted by  
8 the Tenth Circuit, which has rejected such a blanket rule given that a dismissal  
9 with prejudice might still have an adverse effect on the defendant or other  
10 parties to the litigation. See *County of Santa Fe v. Public Service Co. of N.M.*  
11 311 F.3d 1031, 1049 (10<sup>th</sup> Cir. 2002). Moreover, the Supreme Court stated in  
12 *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505, 121 S.Ct.  
13 1021, 149 L.Ed.2d 32 (2001), that a dismissal with prejudice under Rule 41  
14 generally has "the consequence of not barring the claim from other courts,"  
15 but rather re-filing in the district court that issued the dismissal with prejudice.  
16 If a dismissal with prejudice under 41 is not sufficient for claim preclusion,  
17 then there are myriad circumstances under which even a dismissal with  
18 prejudice would prejudice the defendant. Consequently, the district court has  
19 discretion in determining whether to grant a Rule 41(a)(2) dismissal.<sup>22</sup>

20           81.     Johnson initially asserted that the Commission did not have jurisdiction to resolve  
21 Swing First's claims because it would require an interpretation of both the USA and MSA  
22 contracts.<sup>23</sup> Johnson now asserts, that through recent discovery, Johnson learned that the USA was  
23 never assigned to Swing First, and that the issue of whether the Commission has jurisdiction to  
24 interpret the USA and MSA is no longer an issue in this case. As a result, Johnson stated that it has  
25 filed a Motion for Summary Judgment in the Superior Court Case seeking dismissal of Swing First's  
26 claims arising under the USA.<sup>24</sup> Johnson states that based on the new found information that the  
27 USA was never assigned to Swing First, Johnson has reversed its position and now believes that the  
28 Commission is the appropriate forum to address Swing First's claims under the Amended Complaint  
as well as Johnson's counterclaims. Johnson contends that Swing First's claims and Johnson's  
counterclaims may only be addressed by the Commission and not Superior Court.<sup>25</sup> Johnson argues  
that pursuant to the Commission's authority granted in Article 15 § 3 of the Arizona Constitution, the  
Commission has exclusive and plenary jurisdiction to address conflicts over customer service and

<sup>21</sup> See, *Samsung Electronics Co., Ltd v. Rambus, Inc.* 440 F.Supp 2d 495 (E.D.Virginia 2006).

<sup>22</sup> Id at fn 11.

<sup>23</sup> In its Motion for Summary Judgment, Johnson relied on the holding set forth in *Trico v. Ralston*, which stated that "the construction and interpretation to be given to legal rights under a contract resides solely with the courts and not the corporation commission." *Trico Electric Coop. v. Ralston et al.*, 67 Ariz. 358, 196 P.2d 470 (1948).

<sup>24</sup> See Johnson's Notice of Filing Motion for Summary Judgment in Superior Court Case docketed with the Commission on January 19, 2012.

<sup>25</sup> Johnson's Response in Opposition to Swing First Withdrawal at 4.

1 rates and charges for utility service under a tariff.<sup>26</sup>

2 82. Johnson argues that under the Commission's constitutional and legislative authority,  
3 the Commission can prescribe just and reasonable rates and charges and can address consumer  
4 complaints.<sup>27</sup> Johnson also contends that the Commission's exclusive authority has been extended to  
5 include the resolution of customer complaints involving the reasonableness of services, rates, and  
6 charges.<sup>28</sup>

7 83. Johnson argues that the Commission has already asserted primary jurisdiction over  
8 Swing First's Amended Complaint, by holding oral arguments, issuing procedural orders and rulings  
9 on discovery disputes, ruling on Johnson's MSJ, and in prohibiting Johnson from disconnecting water  
10 service to Swing First for non-payment of the disputed bills.<sup>29</sup> Therefore, Johnson asserts that the  
11 issue of primary jurisdiction is moot.<sup>30</sup>

12 84. Johnson states that if an analysis of primary jurisdiction is needed, it believes that  
13 *Campbell v. Mountain States Tel. & Tel. Co.*<sup>31</sup> supports its argument that the Commission has  
14 primary jurisdiction over the Amended Complaint.<sup>32</sup> Johnson states that *Campbell* involved a  
15 complaint brought in Superior Court by a customer of Mountain States Telephone & Telegraph  
16 against the utility for the failure to provide unintercepted and uninterrupted telephone service.<sup>33</sup>  
17 According to Johnson, the Arizona Court of Appeals ruled that the Plaintiff's request for  
18 compensatory damages for loss of income and business, aggravation, mental and physical suffering,  
19 inconvenience, distress, and aggravation of a physical condition; and a request for punitive damages  
20 arising out of the telephone's company's failure to provide uninterrupted telephone service, involved  
21 facts and theories of tort and contract and were outside the Commission's area of expertise.<sup>34</sup>  
22 Johnson states that the Court of Appeals in *Campbell* clarified that while the telephone company's  
23 motion to dismiss raised the failure to exhaust administrative remedies, the real issue was that the

24  
25 <sup>26</sup> Id. at 4.

<sup>27</sup> Id.

<sup>28</sup> Id. at 5.

26 <sup>29</sup> Johnson's Supplemental Response in Opposition to Swing First's Withdrawal at 7-8.

<sup>30</sup> Id.

27 <sup>31</sup> *Campbell v. Mountain States Tel. & Tel. Co.* 120 Ariz. 426, 431-32, 586 P.2d 987,991(App.1978)

<sup>32</sup> Johnson's Supplemental Response in Opposition to Swing First's Withdrawal at 10.

28 <sup>33</sup> Johnson's Supplemental Response in Opposition to Swing First's Withdrawal at 10.

<sup>34</sup> Id.

1 case should be dismissed because exclusive primary jurisdiction lies with the Commission.<sup>35</sup> The  
 2 Court of Appeals reversed the Superior Court ruling and found that exclusive primary jurisdiction did  
 3 not lie with the Commission but with the court. The Court of Appeals in *Campbell* stated:

4 In this case, appellees [telephone company] have consistently argued that appellant's  
 5 [Campbell] complaint is concerned only with the technical manner and means of  
 6 providing telephone service. Were appellees' contentions supported by the complaint,  
 7 we would have no trouble in affirming dismissal of the complaint on the ground of  
 8 primary jurisdiction since questions involving the only manner and means of providing  
 9 telephone service raise "issues of fact not within the conventional experience of judges,"  
 10 *Far East Conference*, supra, 342 U.S. at 574, 72 S.Ct. at 494, but within the duties and  
 11 expertise of the Corporation Commission.

12 Despite appellees' contentions, however, appellant's complaint deals with much more  
 13 than the mere manner and means of providing telephone service. As our summary of the  
 14 complaint above indicates, appellant has proffered three claims in tort - for tortious  
 15 interference with telephone service, intentional infliction of emotional distress, and  
 16 invasion of privacy - and one claim for breach of contract. Obviously, each of these  
 17 claims is elementally based on the manner and method of providing service, and other  
 18 matters within the particular expertise of the Corporation Commission. However, the  
 19 claims' most important aspects involve facts and theories of tort and contract far afield of  
 20 the Commission's area of expertise and statutory responsibility. Indeed, appellant's tort  
 21 and contract claims are the type of traditional claims with which our trial courts of  
 22 general jurisdiction are most familiar and capable of dealing. See *Trico Electric*  
 23 *Cooperative v. Ralson*, supra; *General Cable Corp. v. Citizens Utilities Co.*, supra;  
 24 *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411 (1961).

25 Thus, while it is undeniable that appellant's claims do involve the adequacy and method  
 26 of telephone service and that such issues are within the Commission's jurisdiction under  
 27 A.R.S. § 40-203 and § 40-321(A), these issues are not predominant. This case, as  
 28 determined by the complaint, does not involve the question of whether appellees are  
 adequately providing telephone service to the public. Further, appellant is not seeking  
 injunctive relief to establish broad public doctrines, or rights to service or levels of  
 service. In short, appellant's case involves relatively simple tort and contract issues  
 revolving around a central inquiry: whether, under traditional judicial principles,  
 appellees committed a civil wrong against appellant. Because these issues predominate,  
 it is clearly not essential for the courts to "refrain from exercising [their] jurisdiction until  
 after" the specialized administrative agency "has determined some question or some  
 aspect of some question arising in the proceeding before the court." Davis, supra § 19.01,

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<sup>35</sup> Id.

1 at 3. As a result, we decline to apply the discretionary doctrine of primary jurisdiction so  
 2 as to vest *exclusive* primary jurisdiction in the Corporation Commission.<sup>36</sup>

3 85. Johnson argues that unlike in *Campbell*, Swing First's claims are within the  
 4 Commission's expertise because they involve only the manner and means of providing water service  
 5 that raise issues of fact not within the conventional expertise of judges.<sup>37</sup> Johnson also argues that  
 6 Swing First's claims are "elementally based on the manner and method of providing service, and  
 7 other matters within the particular expertise of the Corporation Commission."<sup>38</sup> Johnson contends  
 8 that Swing First's claims do not have as their "most important aspects, facts and theories of tort and  
 9 contract far afield of the Commission's area of expertise and statutory responsibility."<sup>39</sup> Therefore,  
 10 Johnson asserts that the *Campbell* case cited by Staff supports the exercise of primary jurisdiction by  
 11 the Commission in this case.<sup>40</sup>

#### 11 Swing First's Position

12 86. Swing First argues that it does not need Johnson's permission to withdraw its  
 13 Amended Complaint,<sup>41</sup> and states that assuming *arguendo* it did need Johnson's permission to  
 14 withdraw its Amended Complaint, Johnson has already given that permission by urging Swing First  
 15 to withdraw its complaint.<sup>42</sup> Swing First asserts that on September 6, 2011, Johnson stated during the  
 16 Commission's Open Meeting that it would not oppose Swing First's withdrawal of its Amended  
 17 Complaint.<sup>43</sup> Further, Swing First argues that again on September 21, 2011, Johnson urged Swing  
 18 First to withdraw its Amended Complaint in a pleading.<sup>44</sup> Swing First stated that six days later it  
 19 accepted Johnson's offer and withdrew its Amended Complaint, and then seven days later Johnson  
 20 reversed its position and now opposes withdrawal of the Amended Complaint.<sup>45</sup> Swing First argues  
 21 that Johnson gave Swing First its permission when it urged Swing First to withdraw its complaint and  
 22 stated Johnson would not oppose it.<sup>46</sup>

23 <sup>36</sup> *Campbell v. Mountain States Tel. & Tel. Co.* 120 Ariz. 426, 431-32, 586 P.2d 987, 991 (App.1978).

24 <sup>37</sup> Johnson's Supplemental Response in Opposition to Swing First's Withdrawal at 10.

25 <sup>38</sup> *Id.*

26 <sup>39</sup> *Id.*

27 <sup>40</sup> *Id.*

28 <sup>41</sup> Swing First Reply to Johnson's Response at 7.

<sup>42</sup> *Id.*

<sup>43</sup> Commission's Open Meeting held on September 6, 2011. Counsel for Johnson stated, "we will make any avows on the record that we will not discontinue service to Swing First until the disputed amounts are resolved either in the Superior Court case or the complaint."

<sup>44</sup> Johnson's Opposition to Swing First Motion for Continuance at 1.

<sup>45</sup> Swing First Timeline at 1.

<sup>46</sup> Swing First Reply to Johnson's Response at 7.

1           87. Swing First argues that it should not be required to litigate its claims before the  
 2 Commission just so Johnson has a forum to litigate its counterclaims.<sup>47</sup> Swing First contends that  
 3 Johnson's counterclaims are outside the Commission's jurisdiction and the legislature did not intend  
 4 for the Commission to hear Complaints brought by a public service corporation against its  
 5 customer.<sup>48</sup> Swing First asserts, in other words, that Johnson is "telling the Commission that Swing  
 6 First cannot withdraw its own complaint because Johnson has filed non-jurisdictional counterclaims"  
 7 in the complaint proceeding."<sup>49</sup> Swing First claims that to grant Johnson's request to deny the  
 8 withdrawal and to allow Johnson to litigate non-jurisdictional claims against a customer before the  
 9 Commission would have a "chilling effect on the willingness of a customer to file a legitimate  
 10 complaint."<sup>50</sup>

11           88. Swing First states that, contrary to Johnson's statements that the Complaint case has  
 12 proceeded too far for Swing First to withdraw its Amended Complaint, the Complaint proceeding has  
 13 not moved at all.<sup>51</sup> In support of its position, Swing First points to the procedural schedule proposed  
 14 by Johnson which included the filing of updated testimony, discovery, and an estimated three day  
 15 hearing.<sup>52</sup>

16           89. Swing First contends Johnson would not be adversely impacted by Swing First's  
 17 withdrawal of its Amended Complaint, but that Swing First would be "severely" prejudiced if it were  
 18 required to litigate the Superior Court Case and the Complaint case simultaneously.<sup>53</sup> Swing First  
 19 states that the trial for the Superior Court Case is currently scheduled to begin on March 13, 2012,<sup>54</sup>  
 20 and up until that time the parties will be conducting depositions, dispositive motions, mediation, and  
 21 trial preparations.<sup>55</sup> Swing First asserts that since Johnson is represented by a separate law firm in the  
 22 Superior Court Case and Swing First is represented by the same attorney in both the Superior Court  
 23 Case and the Complaint, Swing First will be severely prejudiced if forced to litigate both matters at

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24 <sup>47</sup> Id.

25 <sup>48</sup> Id.

26 <sup>49</sup> Id.

27 <sup>50</sup> Id.

28 <sup>51</sup> Id. at 6.

<sup>52</sup> Id., referencing Johnson's Opposition to Swing First Motion to Continue; Proposed Procedural Schedule; and Notice of Change of Address of Legal Counsel at 5.

<sup>53</sup> Swing First Reply to Johnson's Response at 7.

<sup>54</sup> A review of the Maricopa County Superior Court website shows the trial beginning on March 12, 2012.

<sup>55</sup> Swing First Reply to Johnson's Response at 7.

1 the same time.<sup>56</sup>

2 90. Swing First argues that its Amended Complaint raises claims against Johnson  
3 regarding two contracts. The first contract is the USA which was executed between Swing First's  
4 predecessor and Johnson and allegedly governs the terms of the delivery of irrigation water to the  
5 Golf Course at Johnson Ranch, which is owned by Swing First. The second contract is the MSA,  
6 which Swing First alleges was executed between Swing First and Johnson International. Swing First  
7 claims that under the MSA, Swing First was to receive a water credit from Johnson in exchange for  
8 its agreement to manage the Golf Club at Oasis, which is owned by Johnson International.

9 91. Swing First argues that the fact there was no written assignment of the USA is not new  
10 information and that Swing First has alleged in the Superior Court Case that a contract was formed by  
11 the conduct of the parties and therefore the USA is a binding contract.<sup>57</sup> During oral argument, Swing  
12 First provided portions of a transcript of the deposition of Mr. John Ashton, President of Swing First,  
13 where he admitted on December 13, 2010, that there was never a written assignment of the USA.  
14 Staff concurred that it has been aware that no written assignment of the USA existed.<sup>58</sup> Staff stated  
15 that in the rebuttal testimony filed on March 23, 2009, by Brian Tompsett on behalf of Johnson, Mr.  
16 Tompsett testified that the USA was never formally assigned.<sup>59</sup>

17 92. Swing First asserts that Johnson chose to file its claims against Swing First in Superior  
18 Court and that Johnson acknowledged the jurisdiction of Superior Court over its claims when Johnson  
19 filed its Superior Court Case there.<sup>60</sup> Swing First points out that when Swing First moved to dismiss  
20 the Superior Court Case on the basis, among other things, that the Commission's expertise was needed  
21 to sort out the correct rates for irrigation services, Johnson vigorously opposed Swing First's motion.<sup>61</sup>

22 \_\_\_\_\_  
23 <sup>56</sup> Id.

<sup>57</sup> Swing First's Response to Motion for Summary Judgment in Superior Court case docketed with the Commission on  
24 January 19, 2012. However, Swing First does assert that a fully executed MSA exists.

<sup>58</sup> Tr. at 84.

<sup>59</sup> Id.

<sup>60</sup> Swing First Reply to Johnson's Response at 2.

<sup>61</sup> According to Swing First, Johnson filed its response to the motion to dismiss and stated:

JUC certainly did not sue Swing First in order to determine the correct amount that JUC should have billed Swing First. Rather, JUC asserts a breach of contract/collection claim predicated on a service contract subject to utility rates that have already been approved by the ACC as reasonable. JUC's contract claim does not implicate any technical issues whatsoever, but merely alleges that Swing First has failed to pay for services at the filed rates, and has not met its contractual obligation to make minimum effluent purchases from JUC. This case has absolutely nothing to do with the ACC's plenary constitutional authority to determine just and reasonable rates. Swing First quoting from Johnson's Response to Motion to Dismiss filed in Maricopa County Superior Court Case dated May 7, 2008.

1           93. Swing First asserts that the Superior Court may determine the correct amounts owed by  
 2 the parties under the USA and MSA based on Johnson's assertion that its tariff rate for effluent  
 3 deliveries is \$0.62 per thousand gallons delivered, and that Johnson's tariff rate for CAP water  
 4 deliveries is \$0.83 per thousand gallons delivered.<sup>62</sup> Further, Swing First states that based on  
 5 Johnson's above assertions and Johnson's statement that "it is legally bound to charge the  
 6 Commission-approved rates and charges," the Superior Court may now determine the amount owed by  
 7 the parties because the appropriate rates have already been determined.<sup>63</sup>

8           94. Swing First contends that the central claim in its Superior Court claims against Johnson  
 9 is whether Johnson committed a "civil wrong" against Swing First.<sup>64</sup> Therefore, Swing First asserts its  
 10 claims are within the Superior Court's jurisdiction. In support of its position, Swing First relies on the  
 11 findings in *Qwest Corporation v. Kelly*,<sup>65</sup> in which customers filed a class action suit against Qwest  
 12 arising from their purchase of Qwest's linebacker service.<sup>66</sup> According to Swing First, the customers  
 13 asserted both contract and tort claims. Qwest moved to dismiss the action arguing the Commission  
 14 had "exclusive and plenary jurisdiction over all matters."<sup>67</sup> In *Kelly*, the court concluded that the  
 15 Court had jurisdiction to hear the complaint.

16           95. Swing First states that the judge in the pending Superior Court case has ruled that a  
 17 "jury would have to apply contract principals to determine whether Johnson overcharged Swing First."  
 18 The judge also stated that "the principal difficulty is that, as the Corporation Commission found,  
 19 Johnson's records have been inadequate. The court is left to fill in the gaps. Filling in gaps is an  
 20 exercise in fact finding that must be left for the jury."<sup>68</sup>

21           96. Swing First argues that in addition to its contract issues raised in the Superior Court  
 22 case, a jury must decide multiple tort issues, including trespass, negligence, and defamation.<sup>69</sup> Swing  
 23 First relies on *Campbell* and *Kelly* in support of its position that tort claims are within the general  
 24

25 <sup>62</sup> Swing First Reply to Johnson's Response at 2, quoting from Johnson's Motion for Summary Judgment at 9.

26 <sup>63</sup> Id.

26 <sup>64</sup> Swing First Reply to Johnson's Response at 4.

27 <sup>65</sup> *Qwest Corporation v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (Ariz. App.Div.2, 2002).

27 <sup>66</sup> Swing First Reply to Johnson's Response at 4.

27 <sup>67</sup> Swing First quoting *Qwest v. Kelly* at 10.

28 <sup>68</sup> Swing First quoting Minute Entry filed in Superior Court case dated January 5, 2011.

28 <sup>69</sup> Swing First Reply to Johnson's Response in Opposition of Withdrawal at 4.

1 jurisdiction of the courts.<sup>70</sup> Further, Swing First states that Johnson has argued in the Superior Court  
 2 case that “although the subjects of tariffs and rates would certainly come up in the litigation those  
 3 subjects were not central to the dispute.”<sup>71</sup>

4 97. Swing First asserts that the Commission is not a court of general jurisdiction and  
 5 therefore has no authority to hear a complaint brought by a public service corporation against its  
 6 customer.<sup>72</sup> Swing First argues that under A.R.S. §40-246A, if a public service corporation has a  
 7 claim against a customer, it can only be heard by a court.<sup>73</sup>

#### 8 Staff's Position

9 98. Staff believes Swing First should be allowed to voluntarily withdraw its Amended  
 10 Compliant with prejudice.<sup>74</sup> Staff states that A.R.C.P. Rule 41(a), pertains only to dismissals without  
 11 prejudice and in this case Swing First has requested withdrawal with prejudice.<sup>75</sup>

12 99. Staff relies on *Damron v. Sledge, supra*,<sup>76</sup> to support its position that Swing First  
 13 should be allowed to withdraw its Amended Complaint with prejudice. In *Damron*, the Arizona  
 14 Supreme Court stated:

15 Any time a plaintiff offers to dismiss with prejudice, the attorney for the party  
 16 against whom the dismissal is sought has no grounds for objecting when his  
 17 client's rights are protected. In fact, when a lawyer is retained by a client to  
 18 defend a lawsuit, his ultimate aim is to procure a dismissal with prejudice or a  
 favorable verdict. We therefore hold a plaintiff has an *absolute right* to a  
 voluntary dismissal of his complaint with prejudice.<sup>77</sup>

19 100. The *Damron* court goes on to cite as authority *Smoot v. Fox*, 340 F.2d 301 (6<sup>th</sup> Cir.  
 20 1964). In *Smoot*, the court held that a lower federal district court erred in denying the plaintiff's  
 21 motion to dismiss with prejudice. In *Smoot*, the court stated:

22 No case has been cited to us, nor have we found any, where a plaintiff, upon  
 23 his own motions was denied the right to dismiss his case with prejudice. . .  
 24 We know of no power in a trial judge to require a lawyer to submit evidence  
 on behalf of a plaintiff, when he considers he has no cause of action or for

25 <sup>70</sup> Id.

<sup>71</sup> Swing First quoting from Johnson's Response to Defendants' Motion to Dismiss and Memorandum of Points and  
 26 Authority, dated May 7, 2008.

<sup>72</sup> Swing First Reply to Johnson's Response in Opposition of Withdrawal at 5.

<sup>73</sup> Id.

<sup>74</sup> Staff Response to Swing First Golf Motion to Withdraw filed October 11, 2011.

<sup>75</sup> Id.

<sup>76</sup> *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969).

<sup>77</sup> Id. at 154.

1 any reason wishes to dismiss his action with prejudice, the client being  
2 agreeable. . . A plaintiff should have the same right to refuse to offer  
evidence in support of his claim that a defendant has.

3 *Smoot* goes on to state:

4 Of course, if he [plaintiff] declines to offer evidence, he must suffer the  
5 consequences, which in this case would be judgment against him and a  
6 judgment in favor of defendants. Dismissal of an action with prejudice is a  
7 complete adjudication of the issues presented by the pleadings and is a bar to a  
further action between the parties. An adjudication in favor of the defendants,  
by court or jury, can rise no higher than this.

8 101. Staff states that if Swing First is allowed to withdraw its Amended Complaint, Staff  
9 believes Johnson's counterclaims could remain before the Commission as a Complaint, or Johnson  
10 may seek a declaratory order from the Commission requesting that Johnson be allowed to disconnect  
11 service to Swing First for monies owed as long as Johnson follows the procedures set forth in A.A.C.  
12 R14-2-410.<sup>78</sup> Further, Staff argues that the Commission has concurrent jurisdiction with the Superior  
13 Court to protect Johnson's rights.<sup>79</sup> Therefore, Staff argues that Johnson will not be left without a  
14 forum to assert its rights if Swing First is allowed to withdraw its Amended Complaint with  
15 prejudice.<sup>80</sup>

16 102. Staff states that in this matter, the Superior Court may have concurrent jurisdiction with  
17 the Commission; however, the Superior Court may decide that the Commission has primary  
18 jurisdiction over the issues.<sup>81</sup> According to Staff, the "doctrine of primary jurisdiction is a  
19 discretionary rule created by the courts to effectuate the efficient handling of cases in specialized areas  
20 where agency expertise may be useful."<sup>82</sup>

21 **Superior Court Case**

22 103. Since 2008, the Superior Court case filed by Johnson against Swing First has run  
23 concurrent with the proceedings in this docket. Recently, Johnson filed, in Superior Court, a Motion  
24 for Summary Judgment which the court granted in part and denied in part. According to the parties,  
25

26 <sup>78</sup> Staff Response to Swing First Motion to Withdraw at 2 and Tr. at 58-60.

27 <sup>79</sup> Id.

28 <sup>80</sup> Id.

<sup>81</sup> Staff Response to Swing First's Motion to Withdraw at 2.

<sup>82</sup> Staff quoting *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 586 P.2d 987 (Ariz.App., 1978).

1 the remaining issues to be litigated in the Superior Court case are as follows.<sup>83</sup>

2 **Johnson**

- 3 a. Johnson's claim that Swing First breached Johnson's ACC approved  
4 contract/tariff and that Swing First owes Johnson approximately \$145,000 for  
5 irrigation water services rendered to Swing First's golf course.
- b. Johnson's claim against Swing First for defamation and interference with  
Johnson's contract obligations.

6 **Swing First**

- 7 a. Swing First's claim that Johnson has been unjustly enriched by Swing First's  
8 management of Johnson's Golf Club at Oasis.
- 9 b. Swing First's claim that Johnson breached its ACC approved contract/tariff and  
10 that Johnson owes Swing First approximately \$56,000 (related to one of five  
11 accounts Swing First has with Johnson). Swing First also seeks punitive damages.
- 12 c. Swing First's claim that Johnson breached its ACC approved contract/tariff and  
13 that Johnson owes Swing First approximately \$45,000 (related to one of five  
14 accounts Swing First has with Johnson).
- d. Swing First's claims against Johnson for trespass.
- e. Swing First's claims against Johnson for negligence.
- f. Swing First's claim against Johnson for defamation.
- g. Swing First's claim against Johnson for fraud.<sup>84</sup>

14 104. Swing First has also requested relief in Superior Court for attorney's fees, costs, and  
15 interest on any judgments.

16 105. On February 13, 2012, Johnson filed, in the Superior Court case, a Motion to Dismiss  
17 for lack of subject matter jurisdiction regarding Swing First's claims that Johnson's breached its  
18 ACC approved contract/tariff. By Minute Entry issued March 6, 2012, Johnson's Motion to Dismiss  
19 was denied.

20 106. The trial in the Superior Court case is set to begin on March 12, 2012.

21 **Discussion and Resolution**

22 107. Article XV § 3 of the Arizona Constitution, describes the Commission's exclusive  
23 powers to regulate public service corporations as follows:

24 The Corporation Commission shall have full power to, and shall, prescribe  
25 just and reasonable classifications to be used and just and reasonable rates and  
26 charges to be made and collected, by public service corporations within the  
State for service rendered therein, and make reasonable rules, regulations, and

27 <sup>83</sup> Swing First Filing of Court Documents docketed February 24, 2012.

28 <sup>84</sup> Johnson's Notice of Filing Updated List of Claims Properly Before the Commission docketed on February 24, 2012 and Johnson's Notice of Filing Pleadings, Ruling, Minute Entries, and Orders docketed on February 24, 2012 (Stipulation of Facts).

orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business. . .

108. In accordance with this constitutional authority, Arizona courts have held that the Commission "has full and exclusive power in the field of prescribing rates which cannot be interfered with by the courts, the legislature or the executive branch of state government."<sup>85</sup> Further, the Commission has the exclusive, plenary authority to determine what is just and reasonable in terms of services offered by a public service corporation and the rates charged for such services.<sup>86</sup>

109. The ability to bring a formal complaint by any person or association of persons against a public service corporation is governed by A.R.S. 40-246(A) which states that:

Complaint may be made by the commission of its own motion, or by any person or association of persons by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or any order or rule of the commission . . .

110. Although A.R.S. §40-246(A) allows complaints to be brought by "any person, or association of persons" setting forth any act or thing "done by any public service corporation" in violation or claimed to be in violation, of any provision of law or any order or rule of the Commission, the statute does not provide that complaints may be brought by a utility against a customer.

111. Johnson contends that Swing First may not voluntarily withdraw its Amended Complaint without a stipulation from Johnson and an order from the Commission, pursuant to A.R.C.P. Rule 41(a). Johnson relies on the language contained in A.A.C. R14-3-101(A) which states in part that:

In all cases in which procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the Commission, the Rules of Civil Procedure for the Superior Court of Arizona as established by the Supreme Court of the State of Arizona shall govern.

112. However, Commission's rules provide for the dismissal of proceedings, as described in A.A.C. R14-3-109(C):

Dismissal of Proceeding. The Commission may dismiss the application or

<sup>85</sup> *Morris v. Ariz. Corp. Comm'n*, 24 Ariz. App. 454, 457, 539 P.2d 928, 931 (1975).  
<sup>86</sup> *Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992).

1 complaint with or without prejudice or may recess said hearing for a further  
2 period to be set by the Commission. A single Commissioner or a Hearing  
3 Officer may adjourn or recess a hearing at any time to submit a  
4 recommendation to the Commission to dismiss the proceeding or may recess  
5 said hearing for a further period to be set by the Commission.

6 113. Contrary to its prior insistence that Swing First must be required to dismiss its  
7 Amended Complaint, Johnson now argues that if Swing First is allowed to withdraw its Amended  
8 Complaint, Johnson will not have a forum to adjudicate its counterclaim, and that Swing First's  
9 withdrawal would leave Johnson in a "prejudicial no man's land" because Johnson previously  
10 committed to the Commission that it will not disconnect water service to Swing First during the  
11 pendency of the Superior Court case.

12 114. Swing First has stated it is aware that withdrawal of its Amended Complaint with  
13 prejudice will foreclose Swing First from raising those claims again before the Commission even if  
14 the Superior Court decides its claims are more appropriately within the Commission's jurisdiction.<sup>87</sup>  
15 Therefore, Swing First has accepted the risk that Superior Court may or may not address the common  
16 claims raised in the Amended Complaint and the Superior Court case.

17 115. We find that Swing First's request to dismiss its Amended Complaint, with prejudice,  
18 should be granted. We agree with Staff's analysis that Swing First should be entitled to dismiss the  
19 Amended Complaint, with prejudice, under the rationale cited in *Damron* and *Smoot*. To the extent  
20 Johnson wishes to pursue disconnection of Swing First for non-payment of billed charges, Johnson  
21 may seek a declaratory order for disconnection from the Commission, as suggested by Staff. Further,  
22 Johnson's remedy to collect an unpaid bill is no different than any other situation in which a utility  
23 seeks to recover an unpaid bill, and we expect Johnson to follow its normal procedure for debt  
24 collection.

25 116. We do not believe it is necessary to decide the issue of whether the Commission or  
26 Superior Court has primary or concurrent jurisdictional authority over issues that may have  
27 commonality to both cases. Rather, we believe it is appropriate to allow Swing First to withdraw its  
28 Amended Complaint, with prejudice, having acknowledged that if it does not prevail in its claims in

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<sup>87</sup> Tr. at 61 and 64.

1 Superior Court, it will be precluded from reasserting the claims it raised in this docket in any future  
2 proceeding.

3 **CONCLUSIONS OF LAW**

4 1. Johnson is a public service corporation pursuant to Article XV of the Arizona  
5 Constitution and A.R.S. 40-246.

6 2. The Commission has jurisdiction over Johnson.

7 3. It is in the public interest to grant Swing First's motion for dismissal of its Amended  
8 Complaint with prejudice.

9 4. The Commission has jurisdiction to resolve any request by Johnson to terminate  
10 service to Swing First.

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**ORDER**

IT IS THEREFORE ORDERED that Swing First Golf, LLC's request to withdraw its Amended Complaint with prejudice as well as its pending motions, is hereby granted.

IT IS FURTHER ORDERED that the above captioned docket shall be administratively closed.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this \_\_\_\_\_ day of \_\_\_\_\_ 2012.

ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

YBK:db

1 SERVICE LIST FOR: SWING FIRST GOLF, LLC v. JOHNSON UTILITIES, LLC

2 DOCKET NO.: WS-02987A-08-0049

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